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No. 99-850

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Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, *et al.*,

Petitioners,

v.

RONALD ARNETT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents respectfully pray that this Court deny the petition for writ of certiorari filed by the California Public Employees' Retirement System and other State defendants.

STATUTES INVOLVED

Petitioners omitted relevant sections of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA").

Section 29 U.S.C. § 623(a)(1) of the ADEA provides:

"It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

Section 29 U.S.C. § 630(1) of the ADEA provides:

"The term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan."

STATEMENT OF THE CASE

Plaintiffs are disabled police officers, firefighters, correctional officers and other "safety employees" of the State of California and local agencies, who are covered by

the California Public Employees' Retirement System (PERS). Plaintiffs and members of their class were hired at age 40 or above. After suffering on-the-job disabilities, they retired and began receiving industrial disability retirement benefits computed as a percentage of their final compensation.

If plaintiffs had not become disabled and had served until they voluntarily retired, they would have received PERS service retirement benefits based on a formula in which the key variable is the employee's actual years of service.[1] That formula is expressed: monthly service benefits = 2% x final monthly pay x actual years of service. For example, an employee who works 25 years before retiring receives 50% of final monthly compensation as service retirement benefits (2% x 25 years), whereas an employee who works 13 years before retiring receives 26% of final compensation (2% x 13 years). Pet. App. 4.

PERS disability retirement benefits are based on a different formula. Until 1980, any safety employee injured on the job received a flat 50 percent of final compensation as a disability benefit, regardless of age or years of actual service. Cal. Gov. Code §§ 21407, 21411, 21413. Effective in 1980, the California Legislature enacted Government Code section 21417 to limit this flat percentage. Under section 21417's statutory formula, a safety employee disabled on the job receives the *lesser* of

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[1] There is another variable, a statutory multiplier which ranges from 1.0 to 1.35 depending on the employee's age at retirement. Because the parties agree that the effect of the multiplier is irrelevant to this appeal, it is not discussed further. *See* Pet. App. 4, n. 3.

(1) 50% of final compensation or (2) the amount the employee would have received as service retirement benefits had the employee worked until age 55. The formula to derive this latter amount is expressed: monthly disability benefits = 2% x final monthly pay x (55 – age at hire).[2] Pet. App. 5.

A chart in the Ninth Circuit opinion demonstrates how section 21417 works. Pet. App. 10. Assume a 30-year-old, a 35-year-old, a 40-year-old, a 45-year-old, and a 50-year-old are hired on the same day in the same job classification and are later disabled on the same day. The employee hired at 30 would receive 50 percent of final pay. (2% x [55-30]) The employee hired at 35 would get 40 percent of final pay. (2% x [55-35]). The employee hired at 40 would get 30 percent of final pay. (2% x [55-40]). The employee hired at 45 would receive 20 percent of final pay. (2% x [55-45]). The employee hired at 50 would receive 10 percent of final pay. (2% x [55-50]). As the Ninth Circuit stated, "The *only* variable that matters in the calculation is the employee's age at hire." Pet. App. 6, italics in original.

In their first amended complaint, plaintiffs alleged disparate treatment, asserting that "by operation of the express terms" of section 21417, their retirement benefits

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[2] Age 55 is *not* a mandatory retirement age for PERS safety employees. Compulsory retirement for state safety employees is 65 and for local safety employees is 60, but only if the local agency finds age is a bona fide occupational qualification. (Cal. Gov. Code §§ 21132, 21131) The Ninth Circuit found that section 21417's use of age 55 as an "artificial ceiling" further exacerbates the statute's age-based discrimination. Pet. App. 9, n. 6.

were lower than those of younger-hired employees. The district court, per Judge Saundra Brown Armstrong, noted that the "net effect of section 21417 is that only employees hired at the age of 30 and under will be able to qualify for disability retirement benefits equal to 50 percent of their final compensation" while "employees hired over the age of 30 are effectively foreclosed from obtaining the full industrial disability retirement allowance. . . . " Pet. App. 31. Nonetheless, the court dismissed the disparate treatment claim but invited plaintiffs to amend to state a disparate impact claim. Pet. App. 25.

Plaintiffs filed a second amended complaint alleging disparate impact. The district court, per Judge Charles R. Breyer, recognized that the "PERS disability provisions do limit the allowance received by older workers and do so based solely and explicitly on the age of those workers." Pet. App. 22. However, the court held that the provisions "are entirely permissible under the applicable age discrimination regulations" *(id.)*, dismissed the complaint, and entered judgment for defendants.

The Ninth Circuit reversed and remanded. *Arnett v. California Public Employees' Retirement System*, 179 F.3d 690 (9th Cir. 1999). The court held that plaintiffs had stated a disparate treatment claim because the calculation of retirement disability benefits under section 21417 is "*entirely* a function of the employee's age at hire." Pet. App. 9, italics in original. The court held that plaintiffs had stated a disparate impact claim by alleging and documenting that the consequences of section 21417 fall more

harshly on those employees hired at age 40 and over. Pet. App. 15.

REASONS WHY THE WRIT SHOULD BE DENIED

I. BECAUSE THIS CASE IS PRIMARILY A DISPARATE TREATMENT CASE, IT WOULD BE A POOR VEHICLE TO CONSIDER THE VIABILITY OF DISPARATE IMPACT CLAIMS UNDER THE ADEA.

Arnett is the wrong case to decide whether disparate impact theory survives under the ADEA because this case began and remains in its essence a disparate treatment case.

In their complaint and first amended complaint, plaintiffs alleged disparate treatment, asserting that "by operation of its express terms," section 21417 discriminates against those PERS members 40 and over when hired "since it limits their disability benefits without limiting the benefits of younger workers on an equal basis." District Judge Breyer, who later dismissed the disparate impact claim, agreed that section 21417 was explicitly age-based: "[T]he PERS disability provisions do limit the allowance received by older workers and do so based *solely and explicitly on the age of those workers. . . .* " Pet. App. 22, italics added.

Plaintiffs added the disparate impact allegations only after District Judge Armstrong, in dismissing the disparate treatment claim, expressly invited plaintiffs to amend, stating, "At most, the disparity in the industrial disability allowance could be germaine to a disparate impact claim." Pet. App. 36, n. 10; *id.* 42. The inclusion of

a disparate impact claim was intended to ensure that, regardless of pleading labels, the validity of section 21417's provision of lower benefits to older-hired workers would be squarely decided.

Because this case is so atypical of disparate impact claims, however, it would be a poor vehicle to decide whether disparate impact allegations are cognizable under the ADEA. Generally, disparate impact cases challenge facially neutral policies that fall more harshly on one group than another. There is usually only a rough empirical correlation between the protected characteristic, such as age, and the challenged practice. Consequently, disparate impact cases are proven by statistical analysis showing a disproportionate effect on a protected group. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

The decisions in which three circuits have held that disparate impact theory is not available under the ADEA demonstrate typical disparate impact cases. In *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996), the plaintiffs, who were refused jobs as flight attendants, alleged United's weight requirements had a disparate impact on older people, who tend to be heavier. In *EEOC v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995), the EEOC claimed the Parker School excluded a disproportionate percentage of older applicants from consideration by setting a low maximum salary for a vacant position. And in *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir.), *cert. denied*, 120 S.Ct. 44 (1999), the plaintiff argued Raytheon's consolidation of operations and restructuring of its work force had a disparate impact on the salaries and positions of older employees, who were higher paid.

This case is entirely different. Section 21417 specifically mandates use of an employee's age at hire in computing his or her disability retirement benefits. Moreover, under section 21417 there is a precise and continuous *reverse* correlation between an employee's age at hire and his or her disability payment. The older the employee is when hired, the smaller the disability retirement benefit he or she will get. *Every* employee hired at age 40 and above *necessarily* receives a lower disability retirement benefit than those hired at below 40. See Pet. App. 10. No statistical analysis will be necessary to prove the disparate impact allegations in the instant matter. Because of the uniqueness of this case, any decision about the viability of a disparate impact claim here would not have wider applicability.

The Court should deny certiorari on the disparate impact issue for the additional reason that a decision on that point would have no practical effect in this case. The California Legislature has just amended the California Fair Employment and Housing Act (FEHA) to confirm that disparate impact claims based on age are recognized under the California statute. The new law, Government Code section 12941.1, becomes effective January 1, 2000. Thus, plaintiffs can allege disparate impact as a pendent claim under the FEHA even if that doctrine is not available under the ADEA.

II. THE NINTH CIRCUIT'S RULING THAT SECTION 21417'S CALCULATION OF BENEFITS IS A "STRICT FUNCTION OF AGE" DOES NOT CONFLICT WITH *HAZEN PAPER* OR CREATE A SPLIT IN THE CIRCUITS.

In *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), this Court held that the employer did not violate the ADEA by firing an employee to prevent vesting of his pension. Since the worker's pension status was determined by his years of service, not his age, the employer had acted on the basis of a factor that was "analytically distinct" from age, the Court reasoned.

> "Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.' " *Hazen Paper*, 507 U.S. at 611.

However, this Court specifically noted that ADEA liability might exist in the "special case" where an employee's pension vests *as a result of his age*, not his years of service. *Id.* at 612-613, italics added.

The Ninth Circuit found that this case presented the "special case" left undecided in *Hazen Paper* – a plan under which employment benefits differ solely "as a result of age." Pet. App. 9. While the *Hazen Paper* employer did not violate the ADEA because its decision was based on actual years of service, the calculation of benefits under section 21417 is "*entirely* a function of the employee's age at hire," the Ninth Circuit concluded. *Id.*, italics in original. The Ninth Circuit's chart, showing the steady decline in disability benefits as an employee's age

of hire rises, proves the accuracy of the court's holding. Pet. App. 10.

PERS had argued below that section 21417 calculated benefits based on "potential years of service" – the difference between age at hire and 55 – and that "potential years of service" was analytically equivalent to "actual years of service" under *Hazen Paper.*

The Ninth Circuit rejected that semantic and inaccurate contention, stating that the calculation of "potential years of service" under section 21417 is a "strict function of age" which bears "no relationship to length of service, seniority or other factors that might permissibly be 'empirically correlated' with age." Pet. App. 10. The practical application of section 21417 "leaves no doubt," the court declared, that "age at hire, not actual years worked or any variant thereof, is the sole basis for lower benefits." *Id.* And, because 55 is not a mandatory retirement age, it acts as an "artificial ceiling" which exacerbates the disparity in benefits provided to younger and older employees. *Id.* at 9, n. 6.

Thus, *Arnett* is entirely consistent with *Hazen Paper.* Both decisions teach that age-based practices violate the ADEA but those predicated on *actual* years of service do not.

This case does not conflict with the Sixth Circuit's decision in *Lyon v. Ohio Educ. Ass'n & Professional Staff,* 55 F.3d 135 (6th Cir. 1995). In *Lyon,* the plaintiffs contended that an early retirement provision violated the ADEA because younger retirees received a larger pension than

older workers who retired with the same length of service. The challenged pension provision imputed the necessary years of service to allow each potential retiree to reach age 62. If two employees each had 21 years of service but one was 52 and the other 56, the plan imputed ten years' extra service to the 52-year-old and six years' extra service to the 56-year-old.

The *Lyon* court affirmed the grant of summary judgment to the defendants for two reasons. First, Congress explicitly intended to permit such provisions in early retirement plans; the "very purpose of offering an early retirement *incentive* plan is to 'buy out' expensive workers." *Id.* at 139-140 and n. 7, emphasis in original. Second, there was no evidence of an improper motive in adopting the challenged provision or any awareness of a disparate effect from which discriminatory intent could be inferred.

Lyon is distinguishable on both grounds. *Arnett* involves unequal pension benefits, not an early retirement incentive plan. Unequal benefits are governed by ADEA section 4(f)(2)(B)(i) (29 U.S.C. § 623(f)(2)(B)(i)), which expressly adopts a principle of "equal benefit or equal cost" and provides that increased cost is the only justification for lower benefits to older workers. By contrast, early retirement incentive plans are governed by section 4(f)(2)(B)(ii) (29 U.S.C. § 623(f)(2)(B)(ii)), which requires only that such plans be "voluntary" and "consistent with the relevant purpose or purposes of the Act." See *Auerbach v. The Board of Educ.*, 136 F.3d 104, 112 (2d Cir. 1998). Moreover, the legislative history of section

21417 establishes the California Legislature knew the provision would reduce disability benefits for older-hired workers and intended that result. See Pet. App. 13.

Arnett is also not in conflict with *Solon v. Gary Community School Corp.*, 180 F.3d 844 (7th Cir. 1999), another early retirement incentive case. The Seventh Circuit found the *Solon* program violated the ADEA. Arguably there is a conflict between *Solon* and *Lyon*, but there is no conflict between those two early retirement cases and this unequal benefit case.

III. OTHER FACTORS, INCLUDING THE POSSIBLE REPEAL OF SECTION 21417, MAKE THE GRANT OF CERTIORARI INAPPROPRIATE.

Several additional circumstances militate strongly against the grant of certiorari.

First, a bill to repeal Government Code section 21417 is presently pending in the California Legislature. AB 448 was introduced during the 1999 legislative session, passed the Assembly 75-2, but was not voted on by the Senate. Co-sponsored by petitioner California Public Employees' Retirement System, the bill will be reconsidered during the next legislative session. Passage of AB 448 would sharply limit the significance of this case. AB 448's text is set forth in the appendix to this brief. App. 1.

Second, the Ninth Circuit decision in this case simply reversed the granting of a motion to dismiss and remanded the case for trial. Although plaintiffs may ultimately prevail, the case could also end in summary judgment, a verdict for the defendants, or in settlement. If the

issues raised by petitioners still survive at the time of final judgment, they will be more fully fleshed out and more appropriate for decision by this Court. The Court should decline to grant certiorari to review this interlocutory order. See *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967).

Third, the entire posture of this case may change based on this Court's pending decision in *Kimel v. State of Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S.Ct. 901 (1999). If the Court rules that federal courts do not have subject matter jurisdiction in ADEA actions brought by state employees, the *Arnett* plaintiffs could refile this action in state court under the California FEHA. The ADEA issues would be moot.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied in this unique case.

Respectfully submitted,

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APPENDIX

TEXT OF AB 448

SECTION 1. Section 21417 of the Government Code is repealed.

SECTION 2. The limitation on industrial disability allowances set forth in Section 21417 of the Government Code, which is repealed by this act, will be inapplicable to allowances first paid on and after the effective date of this act. Allowances paid to persons on and after the effective date of this act that have been previously limited by the operation of Section 21417 shall not be retroactively adjusted, but shall be recalculated and paid without the limitation on and after the effective date of this act.